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Office of Administrative Law Judges
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Issue Date: 16 December 2002

CASE NUMBER: 2002-LHC-1523

OWCP NO.: 07-160899

IN THE MATTER OF

RICHARD A. BROOKS,
Claimant

v.

DEHYCO, INC.,
Employer

and

LOUISIANA WORKERS' COMPENSATION CORP.,
Carrier

APPEARANCES:

Mark Zimmerman, Esq.
On behalf of Claimant

David K. Johnson, Esq.
On behalf of Employer

Before: Clement J. Kennington
Administrative Law Judge

DECISION AND ORDER AWARDING LIMITED BENEFITS

This is a claim for benefits under the Longshore and Harbor Workers' Compensation Act (the Act), 33 U.S.C. § 901, *et. seq.*, brought by Richard A. Brooks (Claimant) against Dehyco, Inc., (Employer) and Louisiana Workers' Compensation Corp. (Carrier). The issues raised by the parties could not be resolved administratively, and the matter was referred to the Office of Administrative Law Judges for a formal hearing. The hearing was held on October 9, 2002, in Lafayette, Louisiana.

At the hearing all parties were afforded the opportunity to adduce testimony, offer documentary evidence, and submit post-hearing briefs in support of their positions. Claimant testified and introduced two exhibits, which were admitted, detailing the medical records of Dr. R. Dale Bernauer.[1] Employer submitted thirteen exhibits, which were admitted, including: medical records from South Cameron Hospital; medical records from Center for Orthopaedics (Dr. Alan Hinton); correspondence to Claimant; vocational job analyses; photographs; Claimant's Social Security earnings; Claimant wage and employment records; Claimant's deposition; a drawling; and Employer's first report of injury.

Post-hearing briefs were filed by the parties.[2] Based upon the stipulations of the parties, the evidence introduced, my observation of the witness demeanor and the arguments presented, I make the following Findings of Fact, Conclusions of Law, and Order.

I. STIPULATIONS

At the commencement of the hearing the parties stipulated and I find:

1. The injury occurred on March 26, 2001, in the course and scope of employment, and there was an employer-employee relationship at the time of the accident;

2. Employer was advised of an injury to Claimant's knee on March 26, 2001;

3. Claimant filed a claim for compensation on July 26, 2001;

4. An informal conference was held on February 14, 2002;

5. Claimant's average weekly wage at the time of the injury was $379.46;

6. Employer paid Temporary Total Disability benefits from March 26, 2001 to May 10, 2001; and

7. Employer paid the medical bills for an emergency room visit, and paid the medical bills of Drs. Sanders and Hinton, but not Bernauer.

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[1] References to the transcript and exhibits are as follows: trial transcript- Tr.__; Claimant's exhibits- CX-__, p.__; Joint Exhibits - Ex-__, p.__; Administrative Law Judge Exhibits- ALJX-__, p.___.

[2] Claimant's attorney also submitted a Reply Post-Trial Brief. Claimant's attorney did not seek permission to file a reply brief and I do not find good cause to admit the brief or its attached exhibit.

II. ISSUES

The following unresolved issues were presented by the parties:

1. Whether Claimant's back and neck injuries are related to his workplace accident;

2. Whether Dr. Dale Bernauer is Claimant's choice of physician;

3. Whether Employer should pay for the medical treatment provided by Dr. Bernauer;

4. Whether an MRI for Claimant back and neck should be authorized by Employer;

5. Claimant's entitlement to weekly indemnity benefits after May 10, 2001; and

6. Penalties, interest, and attorney's fees.

III. STATEMENT OF THE CASE

A. Chronology

Claimant has an eleventh grade education, earned average grades in school and was twenty-four years old at the time of the formal hearing. (Tr. 47). On August 3, 1996, Clamant suffered a horseback riding accident whereby he injured his back at L2, L3, and L4 and had a three day stay in the hospital. (EX 2, p. 39, 42). On August 5, 1996, Claimant had a CAT scan but the results were not in evidence. (EX 2, p. 36, 39). Claimant treated with Dr. Hinton at the Center for Orthopaedics, and Claimant made no complaints of head or neck pain. *Id*. at 36. X-rays revealed a transverse process fracture at L2,3, and 4 and an anterior compression fracture at L2, which was very minor. *Id*. Dr. Hinton recommended a treatment path utilizing a lumbar corset and pain medications. *Id*.

Subsequently, Claimant suffered a workplace accident on March 26, 2001, while working as a roustabout loading pipe on a boat. (Tr. 33-34). A crane moved bundles of pipe onto the ship and Claimant's job was to unhook the bundles of piping onto a pipe rack. (Tr. 35). During this process, the "pipe burst apart" and smashed Claimant's leg between the pipe rack and the pipe. (Tr. 35). Claimant fell backwards striking the deck of the boat. (Tr. 36). Employer called an ambulance, and the emergency personnel fitted Claimant with a neck and leg brace to transport him to South Cameron Hospital. (Tr. 37; EX 1, p. 10). On Admission, at 7:33 p.m., the emergency nurse noted skin abrasion and redness on Claimant's right knee, but Clamant was discharged in stable condition at 10:40 p.m. (EX 1, p.10). At the hospital, Claimant saw Dr. Sanders, the physician who treated his wife and children, to whom he complained of leg pain, but he could not specifically recall if he related to Dr. Sanders that his back was hurting. (Tr. 37, 85). Claimant was treated for a sprain,

fracture, or severe bruise to his leg and was instructed to follow up with an appointment with Dr. Hinton, the same orthopaedist who had treated Claimant for his previous horseback riding accident. (Tr. 38-41; EX 1, p. 12). In Employer's First Report of Injury or Occupational Illness, Employer stated that the nature of the injury was a bruise/contusion to the right leg. (EX 13, p. 1).

Although Claimant testified that he verbally told Dr. Hinton that his back, legs, and neck were bothering him, (Tr. 41-42), Claimant wrote in a health questionnaire that he was only seeking treatment for a leg injury. (EX 2, p. 43). Dr. Hinton did not release Claimant to return to work pending further evaluation. *Id*. at 50. An April 12, 2001 MRI of Claimant right tibia demonstrated a lesion that was suggestive of a benign process, and an abnormal signal intensity consistent with fluid, edema, or inflammation within the longus and brevis muscles and tendons, possibly representing a muscle or tendon tear. *Id*. at 31. On April 16, 2001, Dr. Hinton opined that Claimant suffered a soft tissue contusion and a possible muscle tear with proximal tibia lesion. *Id*. at 30. After physical therapy, Dr. Hinton recommended on May 7, 2001, that Claimant's leg contusion was resolving and Claimant could resume light duty for two weeks and then return to full duty in his former position. *Id*. at 21, 30, 46.

After receiving Dr. Hinton's return to work recommendation, Claimant's supervisor, Bill Maples, attempted on numerous occasions to telephone Claimant to return back to work. (Tr. 122). When Mr. Maples was unsuccessful, he directed Employer's main office to send Claimant a certified letter, received on May 16, 2001, telling Claimant that he could return to light duty, and full duty as of May 21, 2001. (Tr. 122-23; EX 3, p. 1). After speaking with personnel from Employer's office on the telephone, however, Claimant related that they were rude and that he did not think he could return to work because he was still using crutches and on pain medication. (Tr. 89-91). On August 16, 2001, Dr. Hinton reiterated his opinion that Claimant had no evidence of permanent disability and Claimant could return to full duty. (EX 2, p. 11).

Concerned about moderate to severe low back pain that he was experiencing, Claimant hired an attorney who filed a claim for back and neck related injuries in July 2001. (Tr. 135). Claimant's attorney arranged for an appointment with Dr. Bernauer, an orthopaedic surgeon, on October 3, 2001. (CX 1, p. 4-5). In his physical exam, Claimant had a decreased range of motion, positive straight leg raises, but his x-rays were negative despite having symptom of a herniated disc in his neck and back. *Id*. at 12. Dr. Bernauer scheduled an MRI for Claimant to better diagnose the problem, and pending those results, Dr. Bernauer reported on October 30, 2001, that Claimant was unable to return to work as of October 3, 2001 and continuing. (CX 1, p. 12; CX 2, p. 2). Carrier refused to authorize treatment with Dr. Bernauer and refused to authorize the MRI that Dr. Bernauer recommended. (Tr. 23).

Although Claimant did not hold any steady job immediately following his workplace accident, he did perform some odd jobs for cash, and earned up to $200.00 for one month. (Tr. 46, 69). In June 2002, Claimant began working for Daniels Welding and Construction, Inc., as a welder's helper. (Tr. 48; EX 8, p. 1). That job required a pre-employment physical, which was performed at Cameron

Hospital on June 4, 2002. (EX 1, p. 7). In a health questionnaire, Claimant reported that he did not have any back pains, joint pains, muscle strains, or tingling. *Id*. at 9. Claimant quit working at Daniels Welding because the work was too painful to perform and he obtained an easier job at Mac-Nett Environmental Services as a supervisor beginning around August 15, 2002. (Tr. 48; EX 8; EX 9). On September 10, 2002, Claimant voluntarily quit working for Mac-Nett because he ended up doing most of the work that he was hired to supervise, and he could not tolerate the pain. (Tr. 49; EX 9, p. 9).

B. Claimant's Testimony

Claimant testified that he did not like Dr. Hinton because he was not pleased with Dr. Hinton's past treatment related to his earlier horseback riding accident. (Tr. 38-41). Claimant admitted that he did not write on Dr. Hinton's health questionnaire that he was seeking treatment for his back, but Claimant testified that he verbally conveyed that information to Dr. Hinton. (Tr. 88-89). Claimant did not think that Dr. Hinton was taking his complaints about back and neck pain seriously, and Dr. Hinton's sole focus was on Claimant's leg. (Tr. 42). Claimant acknowledged that there was no contemporaneous record whatsoever that he hurt his back on March 26, 2001. (Tr. 43). Claimant related that he did not seek contemporaneous treatment for his back because he was not working, did not have insurance, and could not afford the medical bills. (Tr. 45). Rather than buy prescription medication, he borrowed drugs from his father-in-law and his girlfriend. (Tr. 45).

Claimant testified that he could not return to his job as a roustabout because there was no light duty work, and his back, neck, and leg prevented him from returning to his former job. (Tr. 43). Claimant testified that he could not climb, could not perform much lifting, and could not stand on his feet all day. (Tr. 51-52). Part of his job as a roustabout entailed climbing onto a crane and greasing the crane's cables. (Tr. 54). Claimant testified that he could not perform that task because he had difficulty keeping his balance due to his leg injury. (Tr. 54). Claimant also related that he would have trouble climbing on and off boats, and he would have difficulty binding ship cargo with chains, because the chains were heavy and the work required a lot of bending and stooping. (Tr. 55). Similarly, a roustabout works in the warehouse and had to roll heavy fifty-five galleon drums onto pallets. (Tr. 67).

Likewise, Claimant testified that the light duty job Employer offered to him as fuel operator was beyond his limitations. (Tr. 56). Claimant had performed the work before, and could do everything but lifting and pulling the twenty to thirty foot fuel hoses that were as much as four inches in diameter and sometimes filled with fuel. (Tr. 56-57).

When Claimant received a letter from Employer telling him that he could return to work, Claimant refused to return because he was still using crutches and on pain medication. (Tr. 89). Claimant testified that he called Employer, but some people were rude, and he did not think that Employer wanted him back. (Tr. 90). Claimant acknowledged that in his pre-employment physical for Daniels Welding, he related that he had no problems with dizziness, joint pain, muscle strains, balance, fainting, numbness, tingling, or back pain, but explained his statements on the fact that he

needed a job. (Tr. 93; EX 1, p.9). Clamant testified that after quitting Daniels Welding, he spent several days in bed and prepared for his job at Mac-Nett, which he had procured prior to leaving Daniels Welding. (Tr. 93-94).

Following his workplace accident, Claimant performed odd jobs, such as painting, where he may have earned up to $200.00 for one month, but he related that such activity hurt his back. (Tr. 46, 69). After two or three days of attempting to get a job finished, Claimant testified that he would have to stay in bed for a day. (Tr. 47). While working for Daniels Welding, Claimant testified that he worked as a welder's helper lifting pipe, taking measurements, fabricating, retrieving tools and pipefitting. (Tr. 48). Claimant quit because he could no longer perform the work. (Tr. 48).

At Mac-Nett Environmental, Claimant testified that he was a foreman supervisor where he could tell others what task to do and how to do it. (Tr. 49). In actuality, Claimant ended up doing the work himself, and the activity aggravated his back so much that he quit. (Tr. 49). Claimant related that he could currently lift twenty pounds but he would not likely be able to handle fifty pounds. (Tr. 52).

C. Testimony of Kathy Moon

Ms. Moon testified that she lived with Claimant for the past three years and was familiar with his work related accident on March 26, 2001. (Tr. 24). Prior to his accident, Ms. Moon related that Claimant led a normal life, playing with children, performing yard work, and staying active. (Tr. 24). On the day of the accident, Ms. Moon went to the hospital where she saw Claimant on a stretcher being examined by a physician. (Tr. 24-25). Claimant related that his leg hurt and even complained of back pains and headaches. (Tr. 30). Afterwards, Claimant's leg hurt badly, he had to use crutches, and Claimant continued to complain of neck and back pains. (Tr. 25). Although Claimant's back hurt, his leg was his main concern. (Tr. 25). Claimant is able to walk on his leg now, but he sometimes limps and complains of numbness. (Tr. 26). Although Claimant attempted to go back to work in the late summer of 2002, Ms. Moon related that Claimant was unable to perform his job because the work was strenuous and the hours were very long. (Tr. 27). Ms. Moon also testified that Claimant told Dr. Hinton about his back hurting, but Dr. Hinton had related that he was only concerned with Claimant's leg. (Tr. 31).

D. Testimony of Bill Maples

Mr. Maples testified that he was the manager in charge of the Dehyco facility that employed Claimant. (Tr. 105). The day Claimant was injured, a yard foreman informed Mr. Maples that an accident occurred and Mr. Maples immediately went to the scene. (Tr. 105-06). When he saw Claimant, Mr. Maples testified that his head was a couple of feet from the bullwork and positioned between the bullwork and the side of the ship, a space of about three feet. (Tr. 113). Mr. Maples estimated that Claimant's feet were about four feet from the pipe rack. (Tr. 114).

When he asked Claimant what he had hurt, Claimant responded that he had hurt his leg. (Tr. 121). Claimant pulled his pant leg up, Mr. Maples could not see anything wrong, but Claimant requested an ambulance, which took him to Cameron Hospital. (Tr. 121). Mr. Maples never stated that Claimant had to see Dr. Sanders or Dr. Hinton. (Tr. 122).

After Dr. Hinton released Claimant to return to work, Mr. Maples testified that he attempted to call Claimant eight or ten times over a two or three day period to ask him to return to work. (Tr. 122). Claimant never answered the telephone, thus, Mr. Maples asked the Lafayette office to send Claimant a certified letter. (Tr. 122-23). Mr. Maples never heard for Claimant after he had received the letter. (Tr. 123).

Regarding the light duty position as a fuel operator, Mr. Maples testified that the job entailed some paperwork, and the boat fuel was brought to the fuel operator by a forklift. (Tr. 124). The fuel hoses were contained in separate 4'x4' metal containers to prevent any leakage on the ground. (Tr. 125). The hose was not rolled up inside the container. (Tr. 126). Rather, the hose was laid back and forth, and when it was used for fueling, the operator laid the length of the hose on the dock to eliminate any kinks. (Tr. 126). The fuel operator does not have to lift the entire hose, and Mr. Maples testified that the fuel operator would only have to lift five pounds. (Tr. 126). Hoses were never stored full of fuel because it was dangerous and pumping fuel into a boats tank created a vacuum, so that when the fuel operator locked the fuel line, the remaining fuel in the hose was immediately sucked dry. (Tr. 127). To Mr. Maples knowledge, he had never filled a boat's fuel tank to capacity. (Tr. 127). On some occasions, the hose is handed to crew boat personnel who leave some fuel in the hose, but crew boat personnel drag the hose to its connection, and all the fuel operator must do is place the hose back into its metal container. (Tr. 128). The job description provided by Employer stating that lifting was twenty pounds maximum, lifting ten pounds frequently, and frequent sitting or standing, was an accurate description. (Tr. 128; EX 5, p. 2). Apart from being a fuel operator, Claimant could have answered the company telephone on weekends as part of his light duty job. (Tr. 130).

E. Testimony of Laurie Owens

Ms. Owens, a senior claims representative for Carrier, testified that she was familiar with Claimant's compensation file. (Tr. 21). Ms. Owens acknowledged that Claimant's attorney had filed a letter requesting that Claimant have his choice of physician and also complaining that Claimant needed medical treatment for his neck and back. (Tr. 23).

F. Exhibits

(1) Medical Records from South Cameron Hospital

On March 26, 2001, Claimant went to Cameron Hospital following a workplace accident where a pipe fell on his right leg. (EX 1, p. 10). On admission, at 7:33 p.m., the emergency nurse noted skin abrasion and redness on Claimant's right knee, but Clamant was discharged in stable condition at 10:40 p.m. *Id*. X-rays of the right lower leg revealed no acute traumatic abnormality, but Claimant had long standing evidence of a sclerotic lesion involving the proximal right tibia. *Id*. at 13. Claimant was treated for a sprain, fracture, or a severe bruise and instructed to follow up with a doctor's appointment on the following day. *Id*. at 12.

On June 4, 2002, as part of a pre-employment physical, Claimant reported to medical providers at Cameron Hospital that he had smoked marijuana for three years. (EX 1, p. 6). Claimant also had scaring on his left hand, right finger and right elbow. *Id*.

(2) Medical Records from the Center for Orthopaedics (Dr. Alan Hinton)

On August 5, 1996, Clamant reported in a patient history questionnaire that two days prior a horse had thrown him off and he had landed on his back. (EX 2, p. 39). Specifically, Claimant stated that he "broke" his back at L2, L3, and L4. *Id*. at 42. Claimant also reported that his back pain was worse when he was sitting, standing, walking, and bending, but his pain was reduced by lying down. *Id*. at 39. Claimant described his pain as moderate, reported that he could not lift anything at all , could not walk over 1/4 mile, could not sit more than ½ hour, and could sleep well only using tablets. *Id*. at 40-41. Claimant treated with Dr. Hinton, an orthopaedic surgeon, and Claimant made no complaints of head or neck pain, and specifically denied having any neck pain as a result to the horseback riding accident. *Id*. at 36. On a physical exam, Claimant had negative straight leg raises, and a contusion to the left lateral aspect of his lumbar spine. *Id*. X-rays revealed a transverse process fracture at L2, L3, and L4 and an anterior compression fracture at L2, which was very minor. *Id*. Dr. Hinton recommended a treatment path utilizing a lumbar corset and pain medications. *Id*.

On April 6, 2001, Claimant began treatment anew with Dr. Hinton for an injury to his right leg. (EX 2, p. 54). Dr. Hinton did not release Claimant to return to work pending further evaluation of the nature of Claimant's injury. *Id*. at 50. An April 12, 2001 MRI of Claimant right tibia demonstrated a lesion that was suggestive of a benign process, and an abnormal signal intensity consistent with fluid, edema or inflammation within the longus and brevis muscles and tendons - possibly representing a muscle or tendon tear. *Id*. at 31. On April 16, 2001, Dr. Hinton opined that Claimant suffered a soft tissue contusion and a possible muscle tear with proximal tibia lesion. *Id*. at 30. Claimant's recommended treatment consisted of physical therapy. *Id*. On May 7, 2001, despite Claimant's continued reports of pain and use of one crutch, Dr. Hinton opined that Claimant's leg contusion was resolving and recommended that Claimant could resume light duty for two weeks and then return to full duty in his former position. *Id*. at 21, 46. On August 16, 2001, Dr. Hinton

opined that Claimant had no evidence of permanent disability and Claimant could return to full duty. (EX 2, p. 11).

(3) Medical Records of Dr. R. Dale Bernauer

Claimant first presented to Dr. Bernauer, an orthopaedic surgeon, on October 3, 2001, in relation to a workplace accident he had suffered on March 26, 2001, when a pipe rolled on his leg and he fell on the boat floor. (CX 1, p. 4-5). Claimant described moderate to severe low back pain and pain extending into his right hip, thigh, and lower leg. *Id*. at 7. His back pain was exacerbated by coughing, sneezing, sitting, bending, and lifting, and his pain decreased when he stood or laid down. *Id*. at 7. Claimant related that his neck pain was severe and he had pain between both shoulder. *Id*. at 8. Although Claimant had not sought psychological treatment, he reported depression, disturbed sleep, crying thoughts, irritability, and sexual dysfunction. *Id*. at 9. Claimant also reported to Dr. Bernauer that five years ago he suffered a horseback riding accident where he injured his back and suffered through eight months of pain. *Id*. at 12. In his physical exam, Claimant had a decreased range of motion, positive straight leg raises, but his x-rays were negative despite having symptom of a herniated disc in his neck and back. *Id*. Dr. Bernauer scheduled an MRI for Claimant to better diagnose his problem. *Id*. On October 30, 2001, Dr. Bernauer reported that Claimant was unable to return to work as of October 3, 2001, and continuing. (CX 2, p. 2).

(4) Employer's Correspondence to Claimant Re: Return to Work

On May 15, 2001, Kelli Broussard, Employer's office manager, wrote to Claimant that she had received a return to work slip from Dr. Hinton dated May 7, 2001, recommending light duty, and full duty as of May 21, 2001. (EX 3, p. 1). Claimant received this letter on May 16, 2002. *Id*. at 2. Ms. Broussard related that she had attempted to contact Claimant on several occasions without success before sending a certified letter. *Id*. at 1. Ms. Broussard directed Claimant to contact Bill Maples about returning to work by May 21, 2001. *Id*. Claimant received this letter on May 16, 2001. *Id*. at 2.

(5) Claimant's Subsequent Employment

In June 2002, Claimant began working for Daniels Welding and Construction, Inc. (EX 8, p. 1). Claimant's last paycheck was issued on August 21, 2002, and during his employment Claimant earned $4,848.59. *Id*. On August 13, 2002, Claimant submitted an application to Mac-Net Environmental Services for a position as a foreman. (EX 9, p. 16). Claimant was selected for employment and in payroll records from August 28, 2002 through September 18, 2002, show that Claimant earned $1,784.00. *Id*. at 10. From August 15, 2002 to August 21, 2002, Claimant worked thirty hours, fifty-seven hours the next week, then twelve hours, and thirty-eight hours for Claimant's final week of work ending on September 11, 2002. *Id*. at 10-15. On September 10, 2002, Claimant voluntarily quit. *Id*. at 9.

IV. DISCUSSION

A. Contention of the Parties

Claimant argues that he injured his neck and back in his March 26, 2001 workplace accident. Claimant further contends that he was denied authorization to treat with the orthopaedic surgeon of his choice, Dr. Bernauer, and that Employer/Carrier should authorize an MRI of Claimant's lumbar spine. Claimant also asserts that he is temporarily totally disabled, is unable to return to his former employment, and that he is due benefits from the time of his injury to June 5, 2002, and from September 11, 2002, and continuing based on a compensation rate of $252.97.

Employer argues that Claimant's disability ended on May 10, 2001, at which time he was paid all the indemnity benefits he was entitled to. Employer contends that Claimant's back and neck condition are not related to his workplace accident because Claimant's accident was not one from which a back injury naturally arises, and there is no contemporaneous complaint documented in the medical records of a back injury until October 2001. Employer argues that Claimant was entitled to his choice of treating physicians and he chose Dr. Sanders and Dr. Hinton. Finally, Employer argues that it established suitable light duty employment at its facility, and that Claimant was capable of resuming his former job as of May 21, 2001.

B. Causation

B(1) *Prima Facie* Case

Section 2(2) of the Act defines "injury" as "accidental injury or death arising out of or in the course of employment." 33 U.S.C. § 902(2) (2001). Section 20(a) of the Act provides a presumption that aids the claimant in establishing that a harm constitutes a compensable injury under the Act. Section 20(a) of the Act provides in pertinent part:

> In any proceeding for the enforcement of a claim for compensation under this chapter it shall be presumed, in the absence of substantial evidence to the contrary - -
> (a) That the claim comes within the provisions of this chapter.

33 U.S.C. § 920(a) (2001).

To establish a *prima facie* claim for compensation, a claimant need not affirmatively establish a connection between work and harm. Rather, a claimant has the burden of establishing only that: (1) the claimant sustained physical harm or pain; and (2) an accident occurred in the course of employment, or conditions existed at work, which could have caused, aggravated, or accelerated the harm or pain. *Port Cooper/T. Smith Stevedoring Co., Inc., v. Hunter*, 227 F.3d 285, 287 (5th Cir. 2000); *Kier v. Bethlehem Steel Corp.*, 16 BRBS 128, 129 (1984). Once this *prima facie* case is established, a presumption is created under Section 20(a) that the employee's injury or death arose

out of employment. *Hunter*, 227 F.3d at 287. "[T]he mere existence of a physical impairment is plainly insufficient to shift the burden of proof to the employer." *U.S. Industries/Federal Sheet Metal Inc., v. Director, OWCP*, 455 U.S. 608, 102 S. Ct. 1312, 71 L. Ed. 2d 495 (1982). *See also Bludworth Shipyard Inc., v. Lira*, 700 F.2d 1046, 1049 (5th Cir. 1983)(stating that a claimant must allege injury arising out of and in the course and scope of employment); *Devine v. Atlantic Container Lines*, 25 BRBS 15, 19 (1990)(finding the mere existence of an injury is insufficient to shift the burden of proof to the employer). Once both elements of the *prima facie* case are established, a presumption is created under Section 20(a) that the employee's injury or death arose out of employment. *Hunter*, 227 F.3d 287-88.

B(1)(a) Existence of Physical Harm or Pain

In order to show harm or injury a claimant must show that something has gone wrong with the human frame. *Crawford v. Director, OWCP*, 932 F.2d 152 (2nd Cir. 1991); *Wheatley v. Adler*, 407 F.2d 307 (D.C.Cir. 1968); *Southern Stevedoring Corp. v. Henderson*, 175 F.2d. 863 (5th Cir. 1949). An injury cannot be found absent some work-related accident, exposure, event or episode and while a claimant's injury need not be caused by an external force, something still must go wrong within the human frame. *Schoener v. Sun Shipbuilding and Dry Dock Co.*, 8 BRBS 630 (1978). Under the aggravation rule, an entire disability is compensable if a work related injury aggravates, accelerates, or combines with a prior condition. *Gooden v. Director, OWCP*, 135 F.3d 1066, 1069 (5th Cir. 1998)(pre-existing heart disease); *Kubin v. Pro-Football, Inc.*, 29 BRBS 117, 119 (1995)(pre-existing back injuries).

In this case, Dr. Bernauer, an orthopaedic surgeon, on October 3, 2001, documented moderate to severe low back pain and pain extending into Claimant's right hip, thigh, and lower leg, exacerbated by coughing, sneezing, sitting, bending, lifting, and relieved by standing and laying down. (CX 1, p. 7-8). Claimant related that his neck pain was severe and he had pain between both shoulder. *Id*. at 8. In his physical exam, Claimant had a decreased range of motion, positive straight leg raises, but his x-rays were negative despite having symptom of a herniated disc in his neck and back. *Id*. Accordingly, I find that Claimant established that he suffered a harm in that he has symptoms suggestive of a herniated disc in his back and neck.

B(1)(b) Establishing that an Accident Occurred in the Course of Employment, or that Conditions Existed at Work, Which Could Have Caused the Harm or Pain

Although a claimant is not required to introduce affirmative medical evidence establishing that working conditions caused the harm, a claimant must show the existence of working conditions that could conceivably caused the alleged harm beyond a "mere fancy or wisp of 'what might have been."' *Wheatley v. Adler*, 407 F.2d 307, 313 (D.C. Cir. 1968). Claimant's uncontradicted credible testimony alone may constitute sufficient proof of physical injury. *See v. Washington Metropolitan Area Transit Authority*, 36 F.3d 375, 379 (4th Cir. 1994)(finding the harm related to the claimant's work based on his credible testimony and the medical evidence); *Golden v. Eller & Co.*, 8 BRBS 846, 849 (1978), *aff'd*, 620 F.2d 71 (5th Cir. 1980)(same). On the other hand, uncorroborated

testimony by a discredited witness is insufficient to establish the second element of a *prima facie* case that the injury occurred in the course and scope of employment, or that conditions existed at work that could have caused the harm. *Bonin v. Thames Valley Steel Corp.*, 173 F.3d 843 (2nd Cir. 1999)(unpub.)(upholding ALJ ruling that Claimant did not produce credible evidence that a condition existed at work which could have cause his depression); *Alley v. Julius Garfinckel & Co.*, 3 BRBS 212, 214-15 (1976)(finding the claimant's uncorroborated testimony on causation not worthy of belief); *Smith v. Cooper Stevedoring Co.*, 17 BRBS 721, 727 (1985)(ALJ)(finding that the claimant failed to meet the second prong of establishing a *prima facie* case because the claimant's uncorroborated testimony linking the harm to his work was not supported by the record).

Here, Claimant testified that after his leg was smashed by piping against a pipe rack, he fell to the floor of the boat. (Tr. 36). Bill Maples, who came upon the scene sometime after the accident, testified that He saw Claimant laying on the boat floor. (Tr. 113-14). Although Mr. Maples testified that he did not think that Claimant could have fallen as alleged, Claimant testified that he did not recall exactly how he fell, only that he was knocked down. (Tr. 36, EX 10, p. 39-40). Claimant also stated in his deposition that he suffered from residual pain after his 1996 horseback riding accident, but his back pain was aggravated after his accident. (EX 10, p. 59-60). While Dr. Hinton had released Claimant from his care in 1996, and Claimant used a lumbar corset for approximately one year, Dr. Bernauer opined that Claimant's back and neck conditions were much more serious in that Claimant had evidence of disc herniations. (EX 2, p. 36; EX 10, p. 57; CX 1; p. 9). Dr. Bernauer recorded Claimant workplace accident as a possible cause for Claimant's current symptoms. (CX 2, p. 1). Additionally, Claimant testified that he quit two different jobs during the summer of 2002 even though he needed the money to support his family, because he could not work through his pain - symptoms that he apparently did not have prior to his workplace accident. (Tr. 48-49). Accordingly, I find that Claimant established the second element of a *prima facie* because I find that Claimant suffers from a harm, and conditions existed at work that could have caused or aggravated Claimant's particular harm.

B(2) Rebuttal of the Presumption

"Once the presumption in Section 20(a) is invoked, the burden shifts to the employer to rebut it through facts - not mere speculation - that the harm was not work-related." *Conoco, Inc. v. Director, OWCP*, 194 F.3d 684, 687-88 (5th Cir. 1999). Thus, once the presumption applies, the relevant inquiry is whether Employer has succeeded in establishing the lack of a causal nexus. *Gooden v. Director, OWCP*, 135 F.3d 1066, 1068 (5th Cir. 1998); *Bridier v. Alabama Dry Dock & Shipbuilding Corp.*, 29 BRBS 84, 89-90 (1995)(failing to rebut presumption through medical evidence that claimant suffered an unquantifiable hearing loss prior to his compensation claim against employer for a hearing loss); *Hampton v. Bethlehem Steel Corp.*, 24 BRBS 141, 144-45 (1990)(finding testimony of a discredited doctor insufficient to rebut the presumption); *Dower v. General Dynamics Corp.*, 14 BRBS 324, 326-28 (1981)(finding a physicians opinion based of a misreading of a medical table insufficient to rebut the presumption). The Fifth Circuit further elaborated:

> To rebut this presumption of causation, the employer was required to present *substantial evidence* that the injury was not caused by the employment. When an employer offers sufficient evidence to rebut the presumption--the kind of evidence a reasonable mind might accept as adequate to support a conclusion-- only then is the presumption overcome; once the presumption is rebutted it no longer affects the outcome of the case.

Noble Drilling v. Drake, 795 F.2d 478, 481 (5th Cir. 1986) (emphasis in original). *See also, Conoco, Inc.*, 194 F.3d at 690 (stating that the hurdle is far lower than a "ruling out" standard); *Stevens v. Todd Pacific Shipyards Corp.*, 14 BRBS 626, 628 (1982), *aff'd mem.*, 722 F.2d 747 (9th Cir. 1983)(stating that the employer need only introduce medical testimony or other evidence controverting the existence of a causal relationship and need not necessarily prove another agency of causation to rebut the presumption of Section 20(a) of the Act); *Holmes v. Universal Maritime Serv. Corp.*, 29 BRBS 18, 20 (1995)(stating that the "unequivocal testimony of a physician that no relationship exists between the injury and claimant's employment is sufficient to rebut the presumption.").

To rebut the presumption of causation, Employer demonstrated that Claimant did not complain to Mr. Maples at the scene of the accident that he had hurt his neck or back. (Tr. 121). There is no documentary evidence outside of Claimant's testimony that he ever told Dr. Sanders at South Cameron Hospital that his back and neck were hurting. (EX 1). There is no documented evidence outside of the testimony of Claimant and his fiancé that Claimant ever complained to Dr. Hinton about back or neck pain. (EX 2). In fact, Claimant only reported that his injury was a "leg injury" on Dr. Hinton's April 6, 2001 health questionnaire. (EX 2, p. 43). The first documentary evidence that Claimant complained of back and neck pain is Claimant's July 26, 2001 Claim for Compensation, some four months after the accident. Claimant suffered from a pre-existing back injury in 1996 when he "broke" his back at L2, L3, and L4. (EX 2, p. 39, 42). Claimant also denied having any back or neck problems whatsoever in a June 2002 pre-employment physical. (EX 1, p. 9). Finally, Claimant was able to work from June 2002 to September 2002, performing jobs with a comparable level of exertion to his former employment. (Tr. 48-49). Based on these facts, I find that Employer presented substantial evidence to show that Claimant's back and neck injuries were not caused by his employment and that Employer rebutted Claimant's *prima facie* case for compensation.

B(3) Causation on the Basis of the Record as a Whole

If the presumption is rebutted, it no longer controls and the record as a whole must be evaluated to determine the issue of causation. *Del Vecchio v. Bowers*, 296 U.S. 280, 286, 56 S. Ct. 190, 193, 80 L. Ed. 229 (1935); *Port Cooper/T Smith Stevedoring Co. v. Hunter*, 227 F.3d 285, 288 (5th Cir. 2000); *Holmes v. Universal Maritime Serv. Corp.*, 29 BRBS 18, 20 (1995). In such cases, I must weigh all of the evidence relevant to the causation issue. If the record evidence is evenly balanced, then the employer must prevail. *Director, OWCP v. Greenwich Colleries*, 512 U.S. 267, 281 (1994).

I do not find that Claimant met his burden of proof on the record as a whole to substantiate his claim of work related back and neck injuries. There is no indication in the medical records that Claimant ever complained to emergency room staff of a back problem. (EX 1). Mr. Maples related that he was totally unaware that Claimant had injured his back until this litigation. (Tr. 121). Claimant related on Dr. Hinton's April 6, 2001 pre-examination health questionnaire that his only injury was to his leg. (EX 2, p. 43). I find it highly improbable that Dr. Hinton, who treated Claimant's back injury in 1996, would ignore Claimant's oral complaints of an aggravated back injury. I find the testimony of Claimant and his fiancé at trial that they had orally complained about back and neck problems to Dr. Sanders and Dr. Hinton to be self-serving and I attach little weight to that testimony especially considering that the medical records do not verify their assertions. (Tr. 31, 88-89). While Claimant related that he did not seek contemporaneous treatment for his back because he was not working and did not have insurance, (Tr. 45), Claimant made no showing that he attempted to obtain free care at any of the many Charity Hospitals throughout the State of Louisiana. Finally, I note that Dr. Bernauer's opinion on the cause of Claimant's workplace accident is based on what Claimant told him without any other source of verification. Therefore, I do not credit Claimant's assertion that he injured either his back or his neck in the workplace accident of March 26, 2001. Rather, I find that Claimant injured only his leg and not his back or neck on this date, thus, the back and neck complaints are not causally related to his workplace accident.

C. Choice of Physician

In general, an employer whose worker was injured on the job is, pursuant to Section 7(a) of the Act, responsible for those medical expenses reasonably and necessarily incurred as a result of a work-related injury. *Ingalls Shipbuilding Inc. v. Director, OWCP*, 991 F.2d 163 (5th Cir. 1993); *Perez v. Sea-Land Services, Inc.*, 8 BRBS 130 (1978). An employee has a right to choose an attending physician authorized by the Secretary to provide medical care. 33 U.S.C. § 907(b) (2001). When a claimant wishes to change treating physicians, the claimant must first request consent for a change and consent shall be given in cases where an employee's initial choice was not of a specialist whose services are necessary for and appropriate to the proper care and treatment of the compensable injury or disease. 33 U.S.C. § 907(c)(2) (2001); 20 C.F.R. § 702.406(a) (2001). *Armfield v. Shell Offshore, Inc.*, 25 BRBS 303 (1992); *Senegal v. Strachan Shipping Co.*, 21 BRBS 8 (1988). Otherwise, an employee may not change physicians after his initial choice unless the employer, carrier, or deputy commissioner has given prior consent. 33 U.S.C. 907(c)(2) (2001). "In all other case, consent may be given upon a showing of good cause for change." *Id.*

Section 7(d) of the Act sets forth the prerequisites for an employer's liability for payment or reimbursement of medical expenses incurred by a claimant by requiring a claimant to request his employer's authorization for medical services performed by any physician. *Maguire v. Todd Shipyards Corp.*, 25 BRBS 299 (1992); *Shahady v. Atlas Tile & Marble*, 13 BRBS 1007 (1981) (Miller, J., dissenting), *rev'd* on other grounds, 682 F.2d 968 (D.C.Cir.1982). When an employer refuses a claimant's request for authorization, the claimant is released from the obligation of continuing to seek approval for subsequent treatments, and thereafter need only establish that subsequent treatment was necessary for his injury in order to be entitled to such treatment at

employer's expense. *Schoen v. U.S. Chamber of Commerce*, 30 BRBS 112 (1996); *Anderson v. Todd Shipyards Corp.*, 22 BRBS 20 (1989). Specifically Section 7(d) provides:

> (1) An employee shall not be entitled to recover any amount expended by him for medical or other treatment or services unless--
>
> (A) the employer shall have refused or neglected a request to furnish such services and the employee has complied with subsections (b) and (c) of this section and the applicable regulations; or
>
> (B) the nature of the injury required such treatment and services and the employer or his superintendent or foreman having knowledge of such injury shall have neglected to provide or authorize same.

33 U.S.C. § 907(d) (2001). *See also* 20 C.F.R. § 702.421 (2001); *Shahady v. Atlas Tile & Marble Co.*, 682 F.2d 968, 970 (D.C. Cir. 1982)(awarding reimbursement for medical expenses after being discharged by employer's physician); *McQuillen v. Horne Bros., Inc.*, 16 BRBS 10, 15 (1983)(allowing medical costs only if the claimant first notified the employer).

In this case, Claimant requested medical treatment for his back and neck conditions from Carrier and requested his "choice of physician," Dr. Bernauer. (Tr. 21-23). Because I find that Claimant's back and neck conditions are not related to his workplace accident, Employer/Carrier is not responsible for Dr. Bernauer's treatment under Section 7 of the Act.

Merely because Claimant sought treatment for another physician after Employer/Carrier denied medical benefits for an unrelated condition does not change Claimant's obligations under the regulations to request a change of physician for his workplace accident. In this case, I find that Dr. Hinton is Claimant's choice of physician. This case is analogous to *Senegal v. Strachan Shipping Co.*, 21 BRBS 8, 11 (1988), where an injured worker was referred to a physician, Dr. Palm, by the emergency room that treated the injured worker for inhalation of acetic acid. After that referral, the claimant continued to receive medical treatment from Dr. Palm until he was released to return to work. *Id*. Thereafter, the claimant sought treatment from a second physician and the employer did not render its consent. *Id*. Accordingly, the Board held that Dr. Palm provided all the reasonable and necessary treatment for the claimant, the employer was not required to give its consent to a change of physician, and employer was not responsible for the costs associated with unauthorized physicians. *Id*. *See also Bulone v. Universal Terminal & Stevedoring Corp.*, 8 BRBS 515, 517-18 (1978) (finding that a physician referred to the claimant by the emergency room personnel was not Claimant's choice of physician when the claimant spoke very little English, and believed in good faith based of a note he received that he was required to treat with the particular physician); *Shaver v. Cascade General, Inc.*, 33 BRBS 268, 273 (1999) (ALJ) (finding a that an employee exercises his choice of physician under the Act when he desired that physician, he was aware of his rights under the Act to chose another physician but waived them, or was dilatory in asserting his rights to choose a different physician).

There is no showing in this case that Dr. Hinton was Employer's choice of physician based on a medical emergency. *See* 33 U.S.C. § 907(b) (2001). Rather, Claimant was in no need of immediate emergency care, was able to articulate to hospital staff the events of his injury, and did not follow up with an orthopaedist until eleven days after his emergency room visit. (EX 1, p. 10; EX 2, p. 54). Claimant treated with Dr. Hinton on several occasions following his accident and never objected to his treatment until after he was released to return to work in May 2001. Claimant was already familiar with Dr. Hinton as Dr. Hinton had treated him in 1996 for his horseback riding accident. (EX 2, p. 39). Thus, I find that Dr. Hinton was Claimant's choice of physician. because: 1) Dr. Hinton was Claimant's previous treating physician for an unrelated accident; 2) Claimant failed to effectively object to Dr. Hinton as a treating orthopaedist at the hospital; 3) Claimant failed to object or request another treating physician within the eleven days prior to his first visit with Dr. Hinton; and 4) Claimant voluntarily underwent treatment with Dr. Hinton and failed to object to that treatment until Dr. Hinton opined that Claimant could return to work.[3] Accordingly, Dr. Hinton remains Claimant's treating physician until such time as Employer or Carrier consent to a change of treating physicians, or until Claimant can demonstrated that there is good cause for change in accordance with the Act and implementing regulations.

D. Reasonableness and Necessity of Medical Treatment - MRI

Section 7(a) of the Act provides that "the employer shall furnish such medical, surgical, and other attendance or treatment . . . for such period as the nature of the injury or the process of recovery may require." 33 U.S.C. § 907(a) (2001). The Board has interpreted this provision to require an employer to pay all reasonable and necessary medical expenses arising from a workplace injury. *Dupre v. Cape Romaine Contractors, Inc.*, 23 BRBS 86 (1989). Because Claimant failed to establish that his workplace injury caused back and neck related problems, Claimant is not entitled to an MRI under the Act.

E. Nature and Extent of Injury and Date of Maximum Medical Improvement .

Disability under the Act is defined as "incapacity because of injury to earn wages which the employee was receiving at the time of injury in the same or any other employment." 33 U.S.C. § 90 2(10). Disability is an economic concept based upon a medical foundation distinguished by either the nature (permanent or temporary) or the extent (total or partial). A permanent disability is one which has continued for a lengthy period and is of lasting or indefinite duration, as distinguished from one in which recovery merely awaits a normal healing period. *Watson v. Gulf Stevedore Corp.*, 400 F.2d 649 (5th Cir. 1968); *Seidel v. General Dynamics Corp.*, 22 BRBS 403, 407 (1989); *Stevens v. Lockheed Shipbuilding Co.*, 22 BRBS 155, 157 (1989). The traditional approach for determining whether an injury is permanent or temporary is to ascertain the date of maximum medical improvement (MMI).

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[3] In this regard, I note that Claimant's rejected exhibit, seeking Dr. Bernauer as a choice of physician dated on May 22, 2001, attached to his Reply Post-Hearing Brief would not have made any difference in rendering my decision.

The determination of when MMI is reached, so that a claimant's disability may be said to be permanent, is primarily a question of fact based on medical evidence. *Hite v. Dresser Guiberson Pumping*, 22 BRBS 87, 91 (1989). *Care v. Washington Metro Area Transit Authority*, 21 BRBS 248 (1988). An employee is considered permanently disabled if he has any residual disability after reaching MMI. *Lozada v. General Dynamics Corp.*, 903 F.2d 168, 23 BRBS (CRT)(2d Cir. 1990); *Sinclair v. United Food & Commercial Workers*, 13 BRBS 148 (1989); *Trask v. Lockheed Shipbuilding & Construction Co.*, 17 BRBS 56 (1985). A condition is permanent if a claimant is no longer undergoing treatment with a view towards improving his condition, *Leech v. Service Engineering Co.*, 15 BRBS 18 (1982), or if his condition has stabilized. *Lusby v. Washington Metropolitan Area Transit Authority*, 13 BRBS 446 (1981).

E(1) Nature of Claimant's Injury

As documented by Dr. Hinton on April 16, 2001, Claimant suffered a soft tissue contusion and a possible muscle tear with a proximal tibia lesion. (EX 2, p. 30).

E(2) Extent of Claimant's Disability

Dr. Hinton did not release Claimant to return to any work from the time of his accident on March 26, 2001, until May 7, 2001, at which time he opined that Claimant could return to light duty. (EX 2, p. 21, 46, 50). By May 21, 2001, Dr. Hinton opined that Claimant could resume his regular longshore duties. *Id*. at 21. Claimant argues that he had difficulty climbing, balancing, bending, stooping, lifting over twenty pounds, and standing for long periods of time. (Tr. 51-52, 55-56). Furthermore, Claimant testified that the extent of his leg injury was such that he could not perform the offer of light duty work at Employer's facility on May 16, 2001 because he was still using a crutch and was on pain medication. (Tr. 89). I do not find that Claimant's testimony is reliable evidence concerning the extent of his leg injury inasmuch as it conflicts with it conflicts with the records of Dr. Hinton who approved Claimant's return to light duty as of May 7, 2001, and full duty as of May 21, 2001.

While Claimant may not be able to perform his former job due to unrelated back and neck conditions, Claimant was approved to return to work based solely to his leg condition. While Claimant may have still been using a crutch, Dr. Hinton had instructed him on May 7, 2001, to discontinue its use. (EX 2, p. 21). Claimant made no showing that his pain medication would so interfere with his physical and mental capabilities such as to prohibit him from engaging in workplace activities.

E(3) Maximum Medical Improvement

I find that Claimant reached maximum medical improvement in regards to this leg contusion on August 16, 2001, the date that Dr. Hinton reported that Claimant had no evidence of permanent disability. (EX 2, p. 11).

F. *Prima Facie* Case of Total Disability

The Act does not provide standards to distinguish between classifications or degrees of disability. Case law has established that in order to establish a *prima facie* case of total disability under the Act, a claimant must establish that he can no longer perform his former longshore job due to his job-related injury. *New Orleans (Gulfwide) Stevedores v. Turner*, 661 F.2d 1031, 1038, 14 BRBS 156 (5th Cir. 1981), *rev'g* 5 BRBS 418 (1977); *P&M Crane Co. v. Hayes*, 930 F.2d 424, 429-30 (5th Cir. 1991); *SGS Control Serv. v. Director, Office of Worker's Comp. Programs*, 86 F.3d 438, 444 (5th Cir. 1996). He need not establish that he cannot return to *any* employment, only that he cannot return to his former employment. *Elliot v. C&P Telephone Co.*, 16 BRBS 89 (1984). The same standard applies whether the claim is for temporary or permanent total disability. If a claimant meets this burden, he is presumed to be totally disabled. *Walker v. Sun Shipbuilding & Dry Dock Co.*, 19 BRBS 171 (1986). Here, Dr. Hinton released Claimant to return to light duty employment on May 7, 2001, and full duty on May 21, 2001 in relation to his leg injury. Accordingly, I find that Claimant a *prima facie* case of total disability from March 26, 2001 to May 21, 2001, after which he was able to resume his former longshore duties.

Suitable Alternative Employment

Once the *prima facie* case of total disability is established, the burden shifts to the employer to establish the availability of suitable alternative employment. *Turner*, 661 F.2d at 1038; *P&M Crane*, 930 F.2d at 430; *Clophus v. Amoco Prod. Co.*, 21 BRBS 261, 265 (1988). Total disability becomes partial on the earliest date on which the employer establishes suitable alternative employment. *SGS Control Serv. v. Director, OWCP*, 86 F.3d 438, 444 (5th Cir. 1996); *Palombo v. Director, OWCP*, 937 F.2d 70, 73 (D.C. Cir. 1991); *Rinaldi v. General Dynamics Corp.*, 25 BRBS 128, 131 (1991). A finding of disability may be established based on a claimant's credible subjective testimony. *Vessel Repair, Inc.*, 168 F.3d at 194 (crediting employee's reports of pain); *Mijangos v. Avondale Shipyards, Inc.*, 948 F.2d 941, 944-45 (5th Cir. 1991)(crediting employee's statement that he would have constant pain in performing another job). An employer may establish suitable alternative employment retroactively to the day Claimant reached maximum medical improvement. *New Port News Shipbuilding & Dry Dock Co.*, 841 F.2d 540 (4th Cir. 1988); *Bryant v. Carolina Shipping Co., Inc.*, 25 BRBS 294 (1992). Employer may also establish suitable alternative employment by offering the claimant a position within its facility so long as it does not constitute sheltered employment. *Darden v. Newport News Shipbuilding & Dry Dock Co.*, 18 BRBS 224 (1986).

Here, Employer offered a light duty position to Claimant at its facility consistent with Dr. Hinton's light duty restrictions. (EX 3, p. 1-2). The position was as a fuel operator, was light duty work, entailed frequent sitting and standing, occasional lifting of up to twenty pounds, occasional pushing, pulling, bending, and squatting, frequent reaching, and rare twisting , climbing or kneeling. (EX 2, p. 17-18). Claimant testified that he was unable to perform the work because he was familiar with the position, and could do everything but lifting and pulling the twenty to thirty foot fuel hoses

that were as much as four inches in diameter and sometimes filled with fuel. (Tr. 56-57). In this regard, I credit the testimony of Mr. Maples that Claimant would not have to lift the entire hose, and fuel was rarely left in the hose. (Tr. 126-128). Accordingly, I find that Employer established suitable alternative employment within its facility from May 16, 2001,[4] the date it communicated its offer of light duty work to Claimant to May 21, 2001.

G. Conclusion

Claimant failed to establish that his neck and back injuries were related or aggravated by his workplace accident because there are no medical records evincing a contemporaneous neck or back problem; there is no report of a neck or back injury from the scene of the accident; Claimant reported two week after the accident that he had only hurt his leg; Dr. Hinton, who treated Claimant's back injury in 1996, made no notations concerning Claimant's alleged oral complaints of back and neck pain; Claimant failed to seek any contemporaneous medical treatment for his back and neck conditions; and the one physician who made a causal relationship between Claimant's injury and his harm did so based on what he was told by Claimant. Dr. Hinton is Claimant's treating physician because Dr. Hinton was Claimant's previous treating physician for an unrelated accident; Claimant failed to effectively object to Dr. Hinton as a treating orthopaedist at the hospital; Claimant failed to object or request another treating physician within the eleven days prior to his first visit with Dr. Hinton; and Claimant voluntarily underwent treatment with Dr. Hinton and failed to object to that treatment until Dr. Hinton opined that Claimant could return to work. Dr. Bernauer is not Claimant's treating physician because he is an orthopaedist like Dr. Hinton, and Carrier has not consented to a change of treating physicians. Based on the nature and extent of Claimant's leg injury, Employer established suitable alternative employment in its facility from May 16, 2001 to May 21, 2001, after which Claimant did not suffer from any disability within the meaning of the Act.

H. Interest

Although not specifically authorized in the Act, it has been an accepted practice that interest at the rate of six per cent per annum is assessed on all past due compensation payments. *Avallone v. Todd Shipyards Corp.*, 10 BRBS 724 (1974). The Benefits Review Board and the Federal Courts have previously upheld interest awards on past due benefits to insure that the employee receives the full amount of compensation due. *Watkins v. Newport News Shipbuilding & Dry Dock Co., aff'd in pertinent part and rev'd on other grounds, sub nom. Newport News v. Director, OWCP*, 594 F.2d

[4] Unlike job availability in the open market, the date of availability for a job within the employer's facility is the date it is offered to the injured employee. *See* Darden v. Newport News Shipbuilding & Dry Dock Co., 18 BRBS 224 (1986) (finding that the date of the job offer was controlling). Claimant received a certified letter on May 16, 2001, requesting that he come back to work and the letter indicated that Employer had work within his light duty restrictions. (EX 3, p. 2). Although Mr. Maples testified that he attempted to call Claimant several times before this date, (Tr. 122-23), there is no evidence that Claimant had received those offers.

986 (4th Cir. 1979). The Board concluded that inflationary trends in our economy have rendered a fixed six per cent rate no longer appropriate to further the purpose of making Claimant whole, and held that "the fixed per cent rate should be replaced by the rate employed by the United States District Courts under 28 U.S.C. § 1961 (1982). This order incorporates by reference this statute and provides for its specific administrative application by the District Director. *See Grant v. Portland Stevedoring Company, et al.*, 17 BRBS 20 (1985). The appropriate rate shall be determined as of the filing date of this Decision and Order with the District Director.

I. Attorney Fees

Under 33 U.S.C. § 928 Claimant is entitled to an attorney's fee because Claimant's attorney obtained an advantage of additional temporary total compensation benefits from May 10, 2001, to May 15, 2001. No award of attorney's fees for services to the Claimant is made herein since no application for fees has been made by the Claimant's counsel. Counsel is hereby allowed thirty (30) days from the date of service of this decision to submit an application for attorney's fees. A service sheet showing that service has been made on all parties, including the Claimant, must accompany the petition. Parties have twenty (20) days following the receipt of such application within which to file any objections thereto. The Act prohibits the charging of a fee in the absence of an approved application.

V. ORDER

Based upon the foregoing Findings of Fact, Conclusions of Law and upon the entire record, I enter the following Order:

1. In addition to disability benefits already paid under the Act, Employer shall pay to Claimant temporary total disability compensation pursuant to Section 908(b) of the Act for the period from May 10, 2001, to May 15, 2001, based of an average weekly wage of $379.46, and a corresponding compensation rate of $252.97.

2. Employer shall pay Claimant for all future reasonable medical care and treatment arising out of his work-related injuries pursuant to Section 7(a) of the Act, which does not include treatment for Claimant's back and neck.

3. Claimant is entitled to interest on accrued unpaid compensation benefits. The applicable rate of interest shall be calculated immediately prior to the date of judgment in accordance with 28 U.S.C. §1961.

4. Claimant's counsel shall have thirty (30) days to file a fully supported fee application with the Office of Administrative Law Judges, serving a copy thereof on Claimant and opposing counsel who shall have twenty (20) days to file any objection thereto.

A

CLEMENT J. KENNINGTON
Administrative Law Judge